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A Practical and Pragmatic Approach to Freedom of Conscience

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A PRACTICAL AND PRAGMATIC APPROACH TO FREEDOM OF CONSCIENCE

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Using a series of anecdotes and illustrations, the author posits that freedom of conscience, broadly defined, can only be protected, if at all, by assertive individual and group action. Such action must be not just against government interference but also against non-governmental or private activities as well as intimidation. Professor Belsky urges individual balancing of the freedom of conscience and other legal, governmental and societal interests. This balancing is a form of "constitutionalism," and when necessary must be followed up by enforcement through personal action.

INTRODUCTION

It was my first year as a young prosecutor in Philadelphia, 1970. I was assigned to the lowest level—the motions court. This court handled pre-trial motions, such as motions to suppress confessions, search evidence, identification evidence, and also appeals from traffic and magistrate courts.¹ The judge was an older and more experienced warrior who was teaching me as we went along.

Then, we suddenly got a "major trial." Sixty-five protestors had been arrested for protesting against the Vietnam War by blocking one of the city's two main arteries at rush hour. They were convicted and fined at the magistrate level, and thirteen were now appealing. The courtroom, usually empty, was packed. Newspaper reporters were in the room. The television cameras were in the hallway. The demonstrators had self-styled "high-powered" civil rights lawyers, who attracted both local and

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1. See ARLEN SPECTER, THE 1970-1971 REPORT TO THE PEOPLE OF PHILADELPHIA, 212-235, 283 (1972).

national press. The mayor, a former police commissioner,² had stopped in and left a key lieutenant (his anti-civil disobedience guru) to watch over my shoulder.

The chief assistant in the prosecutor's office, the first assistant district attorney, and a good friend of the mayor, had earlier called me into his office.³ He had concerns that I might favor the protestors, as I had been an intellectual supporter of the Columbia University anti-war demonstrations in 1968 while in law school and was a signatory to several anti-war advertisements before and after that. "What are you going to do?" he asked. "Try the case," I responded.

The facts were straightforward and uncontested. The defendants had blocked traffic in front of the Selective Service Building, which housed the draft board, to show their opposition to the Vietnam War and anger at the Mayor's support of the President, who was "causing" the war. Their argument was that this was an act of conscience—they just had to do something. The defendants quoted Thoreau, Ghandi, and Martin Luther King.

I agreed with their anti-war sentiments and maybe even their tactics, but not with their argument. Freedom of conscience, expressed through civil disobedience, meant not just doing something, but doing something with full acceptance of the consequences. You cannot block Broad Street at rush hour and not expect some penalty. The defendants had violated the law—a neutral law not written or applied to stop protests but to avoid disruption. The conviction should be upheld, and it was.⁴

On recently telling this anecdote to fellow law professor Kathleen Waits, who also happens to be my wife, she sagely reminded me of an old cliché: "History is written by the winners."⁵ Like history, she urged, the appropriate expression of "conscience" is determined by the winners. Today, most academics and probably many Americans accept that Vietnam era protestors were exercising "good" conscience.⁶ Many would

2. See generally S.A. PAOLANTONIO & FRANK RIZZO, *THE LAST BIG MAN IN BIG CITY AMERICA* (1993).

3. Richard A. Sprague was the First Assistant. He is probably best known for prosecuting Tony Boyle and other members of the United Mine Workers for the murder of Joseph Yablonski. See generally TREVOR ARMBRISTER, *ACT OF VENGEANCE: THE YABLONSKI MURDERS AND THEIR SOLUTION* (1975).

4. Ken Shuttleworth, *Judge Assails War, Upholds Arrest of 13*, PHILADELPHIA INQUIRER, May 28, 1970.

5. For two recent examples of "alternative histories" seeking to demonstrate this point, see ROBERT HARRIS, *FATHERLAND* (2002) (describing a world where the Nazis defeated the Allies in World War II); PHILIP ROTH, *THE PLOT AGAINST AMERICA* (2004) (describing a world where Lindbergh ran for President against Roosevelt in 1940 and won).

6. It is, of course, also true that there are still many Americans who maintain an ongoing bitterness about the anti-Vietnam War protestors. This was demonstrated in the 2004

have urged that there be no prosecution of these offenders.⁷ We also accept the validity of the core beliefs that led to the civil rights protestors of the 1950s and 1960s, who used marches, demonstrations, sit-ins, and boycotts.⁸ Yet because we disagree with those opposed to desegregation, we now also say that protestors, shouters, and rioters against integration were exercising "bad conscience."⁹ And what about "pro-abortion" and "anti-abortion" demonstrators? Isn't our attitude toward the propriety of their behavior based on whether we are "pro-choice" or "pro-life?"¹⁰

The anti-war demonstration story illustrates the key elements of my thesis. First, I agree with Professor Noah Feldman that the "liberty of conscience" protects individuals from being coerced to act or not act in opposition to core political principles.¹¹ I do not accept a narrow definition that limits this liberty to religion-based issues of conscience.¹² Second, I must acknowledge that my attitude is not the most common one.¹³ Most people equate freedom of conscience with religious freedoms, mainly because there are a specific set of constitutional directives ensuring these liberties.¹⁴ Third, freedom of conscience must be protected not

election campaign, which included anti-John Kerry "Swift Boat" advertisements. See Glen Justice & Eric Lichtblau, *The 2004 Campaign: Campaign Finance: Windfall for Anti-Kerry Veterans' Group, With Texans Among Those Giving Most*, N.Y. TIMES, Sept. 11, 2004, at A13.

7. At the time, even individuals in the prosecutor's office asked why and whether we should proceed with this appeal. Compared to the massive anti-war protests that surrounded the 1968 Democratic Convention in Chicago, at Kent State and those in May of 1971, this short and minor interruption of traffic was almost benign. Many individuals felt that prosecutions for those major protests were inappropriate. Certainly then, prosecutions for this token effort was inappropriate as well. See, e.g., *Paying for Mayday*, NEWSWEEK, Jan. 27, 1975, at 46 (prosecution of Vietnam protestors in D.C. seen as threat to civil liberties). See generally ALAN M. DERSHOWITZ, *AMERICA ON TRIAL 377-78* (2004); GEOFFREY R. STONE, *PERILOUS TIMES 427-87* (2004).

8. See, e.g., *Peterson v. Greenville*, 373 U.S. 244 (1963). See also Martin Luther King, *Letter from Birmingham City Jail* (1963), reprinted in KERMIT L. HALL ET AL., *AMERICAN LEGAL HISTORY 516* (1991).

9. See, e.g., MORRIS DEES, *A LAWYER'S JOURNEY 77* (2001).

10. Compare Tamar Lewin, *Anti-Abortion Protests to Continue, Group Says*, N.Y. TIMES, Jan. 25, 1994, at A17, with Jennifer Lee, *Abortion Rights Group Plans a New Focus and a New Name*, N.Y. TIMES, Jan. 5, 2003, at A19.

11. See Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 351-52, 424 (2002) (Professor Feldman explains that this "liberty of conscience seems to be that every person is entitled not to be coerced into performing actions or subscribing to beliefs that violated his most deeply held principles." *Id.* at 424).

12. See *id.*

13. See generally Michael W. McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1495 (1990) (arguing that the only protection of freedom of conscience intended by the framers of Constitution was that freedom related to religion).

14. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion nor the free exercise thereof . . .").

only by legal mechanisms but also by small "p" political actions,¹⁵ and not just against governmental restrictions or coercion¹⁶ but also against private activities and intimidation.¹⁷ To do this, activists must use First Amendment type arguments—"constitutionalism" rather than constitutional law.¹⁸ Fourth, to insure protection of conscience, some of us must be willing to "stand up and speak out."¹⁹ Whether in a courtroom, city council meeting, mayor's office, corporate headquarters, or non-profit entity suite, any attempt to restrict expressions of what we believe are matters of conscience must be made visible.²⁰

There will be situations when there is a need for practical balancing of the freedom of conscience and other legal, governmental, and societal

15. There may be a constitutional or Constitution-based statutory right that could be used as a litigation sword or shield against improper governmental activities. Yet, courts will sometimes be barred or will sometimes limit themselves from hearing these cases through screening mechanisms like standing, ripeness, mootness, political question, governmental immunity or state action doctrines. See, e.g., *Elk Grove v. Newdow*, 542 U.S. 1 (2004) (standing doctrine; use of "Pledge of Allegiance"); *Atlee v. Laird*, 347 F. Supp. 689 (D.C.Pa. 1972), *aff'd summarily sub. nom.* *Atlee v. Richardson*, 411 U.S. 911 (1973) (political question and immunity doctrines and Vietnam War). Compare *Amalgamated Food Employees Union v. Logan*, 391 U.S. 308 (1968), with *Hudgens v. NLRB*, 424 U.S. 507 (1976) (state action requirement, free speech and shopping malls).

In addition, constitutional-based policy arguments are also often used in legislative and executive branch governmental debates, even when there is no enforcement mechanism to force these branches to listen to them. See, e.g., *Votes in Congress*, WASH. POST, Nov. 14, 1999, (Southern Maryland Extra), at 15 (reporting on the vote on the Amendment to bar funding to a house of worship; the debate focused on separation of church and state concerns even if allowable under First Amendment).

16. The need for "extra-legal" protection mechanisms is particularly important today, because of recent Supreme Court jurisprudence that is less protective of minority religious rights and therefore also of minority non-religious freedom of conscience rights. See Martin H. Belsky, *Anti-disestablishmentarianism—The Religion Clauses at the End of the Millennium*, 33 TULSA L.J. 93 (1997).

17. Because there is no "state action" involved, and therefore often no legal basis to object, pressure—whether personal, political or economic—may be the only remedy. See discussion *infra* note 50 (regarding convenience store policy).

18. Courts, of course, determine the scope and content of "Constitutional Law." Lawyers and lay people, however, often use arguments based on constitutional principles in situations where the law does not apply. This tendency perhaps has gotten more prominent and visible as a result of many of us watching a little too much television. A student may argue that she has a right to "freedom of speech" when a teacher asks her to be quiet in the classroom. A lodge member may raise a concern about "fair" or "due process" before a vote is taken. A civic organization debating whether or not to celebrate a holiday, may hear an argument about separation of church and state. A precocious child may argue against a parent interfering with his right of privacy when the parent asks about what her child did the last night. My children, for example, the offspring of two law professors, disregard all rules of "state action" when they indicate we are depriving them of their "constitutional rights" when we set up some rule or limitation.

19. See ALAN M. DERSHOWITZ, *CHUTZPAH* 3 (1991).

20. This is the basis for the federal and state "open meetings," "open records," and "freedom of information laws." See, e.g., Administrative Procedure Act, 5 U.S.C. § 552 (2000).

interests.²¹ And, while there can be clear cases, determination of the balance is often case by case and can and will change over time.²² Personal assertiveness is essential to make this balancing overt and responsive.²³

The first part of this article defines and applies my definition of freedom of conscience and argues that only personal assertiveness and not just law and policy, can guarantee that it will be protected. Part I presents an inclusive description of freedom of conscience as including religious freedom, free speech, personal liberty, and protections from both public and private actions. Part II gives some illustrations of situations where personal assertiveness was used, sometimes with success, to raise freedom of conscience issues. The first set of anecdotes will deal with issues of interfaith understanding. This will be followed by examples of an area of conscience protection that is sometimes overlooked: fighting for your own positions within your own cultural or religious group. To highlight the need for assertiveness to make conscience issues more overt, in Part III, I will look at how the public and private sectors deal with minority rituals. Part IV will conclude with how we can strike the balance between conscience and other concerns.

21. There are, of course, formal "balancing tests" for the application of the Establishment and Free Exercise Clauses. See Belsky, *supra* note 16. But even before that point is reached, there is also an informal balancing that occurs when individuals consider whether to challenge a violation and there is another balancing when entities decide to enforce or not enforce a legal mandate. See DERSHOWITZ, *supra* note 19, at 316-17, 328.

22. Compare *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (applying a three-part test to determine whether violations of the Establishment Clause bars use of government money to fund programs in church-related schools), with *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (applying neutrality and endorsement test to uphold state voucher program that includes church-related schools), and *Locke v. Davey*, 540 U.S. 712 (2004) (allowing state constitutional provisions to bar state payment for religious education). See also *Stone v. Graham*, 449 U.S. 39 (1980) (barring posting of Ten Commandments on the walls of public school classrooms). But see *Van Orden v. Perry*, 125 S. Ct. 2854 (2005); *McCreary County v. ACLU*, 125 S. Ct. 2722 (2005) (considering the display of Ten Commandments on public property).

23. One of the key aspects of modern attempts to control improper behavior by both private and public parties is the mandate for disclosure. The premise of securities law oversight is public scrutiny through disclosure. See generally Securities and Exchange Act of 1934, 15 U.S.C. § 78(b) (2000). To assure the adequacy of environmental controls, Congress mandated disclosure to the public through discussions and environmental impact statements. See National Environmental Policy Act, § 102, 42 U.S.C. § 4332 (2000). Disclosure, it was presumed, would provide the ability of interested parties to be assertive and allow the appropriate policy decisions to be made. See Martin H. Belsky, *Environmental Policy Law in the 1980s: Shifting Back the Burden of Proof*, 12 *ECOLOGY L.Q.* 1, 16-18 (1984).

I. DEFINING FREEDOM OF CONSCIENCE

As noted earlier, I adopt Professor Feldman's definition of freedom of conscience as the protection of individuals (and I add groups, particularly minority groups) from coercion to act or not act when such action or inaction goes against core personal beliefs or principles. This, of course, covers religious beliefs and actions, but must be broader. It covers governmental restrictions, but should be applied to non-governmental infringements.

A. *Freedom of Conscience and Non-Faith Based Principles*

The Religion Clauses of the First Amendment were based in part on existing state constitutional provisions, like those of Virginia, which stated that "all men have an equal, natural, and unalienable right to the free exercise of religion."²⁴ Specifically, New Hampshire suggested an amendment that "Congress shall make no laws touching religion, or to infringe the rights of Conscience."²⁵ As a result, many legal scholars argue that the protection of the freedom of conscience in our constitutional system was never intended to cover those who did not have a faith basis for their attitudes.²⁶ This was raised as a legal issue in the selective service and conscientious objector cases.²⁷ It is clear, as a legal matter, that we give special protection to beliefs and actions based on those beliefs when they are faith-based. Avoidance of military duty,²⁸ accommodation in the workplace,²⁹ and protection of rituals³⁰ are some examples. But we also accept other, not necessarily faith-based protections, that are

24. Michael W. McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1481 n.360 (1990) (quoting 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 659 (J. Elliot 2d ed. 1836) (June 27, 1788)).

25. See RELIGION AND THE CONSTITUTION (Michael W. McConnell et al. eds., 2002).

26. See FIRST AMENDMENT LAW 461-63 (Kathleen Sullivan & Gerald Gunther eds., 1999). See also John Sexton, *The Warren Court and the Religion Clauses of the First Amendment: A Retrospective*, in THE WARREN COURT 104, 112 (Bernard Schwartz ed., 1996) ("There is no doubt that, to the framers, religion entailed a relationship of man to some Supreme Being. Nonetheless, . . . there is no clear evidence that they wished to protect only theism.").

27. See *United States v. Seeger*, 380 U.S. 163 (1965); *Falbo v. United States*, 320 U.S. 549 (1944).

28. See *Clay v. United States*, 403 U.S. 698 (1971); *Welsh v. United States*, 398 U.S. 333 (1970).

29. See *Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

30. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

derived from constitutional rights like the freedom of speech, freedom of assembly, and right to personal liberty.

For example, the law protects those who seek to express their opposition to war through protest. It allows demonstrators to protest in front of an abortion clinic³¹ or to protest the killing of pup seals.³² It protects those who want to make a conscientiously held statement by burning a flag.³³ It preserves a degree of personal autonomy when an individual decides to use a contraceptive,³⁴ have an abortion,³⁵ or form an intimate relationship with someone of the same sex.³⁶ I include all these as part of a freedom of conscience. One does not need a special faith-based focus to secure these freedoms. We just have them.

B. Freedom of Conscience in the Private Sphere

The protection of rights must also be pursued in a non-governmental setting. Government is not the only entity that can infringe on one's liberty. Intentionally or unintentionally, a friend, a neighbor, an acquaintance, a business, or an employer can threaten one's right to choose to be or not be a part of the larger group on one issue or another. Even though we live in a democratic society that is premised on the power of numbers, we know that those numbers are collectives and that we might be in the minority on some different basic core issue in the future. Thus, one of the premises of our society is that we balance majority power with minority protections.³⁷ To secure this balance, sometimes the majority must be pushed to adhere to a set of principles or accommodations, even though it is not technically required to do so by law. Should prayers at a Rotary Club be Christian-based?³⁸ Should mall displays be based on ex-

31. See *Madsen v. Women's Health Ctr.*, 512 U.S. 753 (1994).

32. See Kennedy Warne, *Harp Seals*, NAT'L GEOGRAPHIC 50 (Mar. 1, 2004).

33. *Texas v. Johnson*, 491 U.S. 397 (1989).

34. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

35. *Roe v. Wade*, 410 U.S. 959 (1973); *Planned Parenthood of Southeastern Pa. v. Casey*, 510 U.S. 1309 (1994).

36. *Lawrence v. Texas*, 539 U.S. 558 (2003).

37. MARTIN EDELMAN, *DEMOCRATIC THEORIES AND THE CONSTITUTION* 1516 (1984) (stating that the Constitution was drafted to preserve majority rule with checks and balances to protect minorities).

38. I was asked a number of years ago to speak at one of the larger Rotary Clubs in the Tulsa area. The meetings are held at a hotel. Having experienced, and having felt uncomfortable when an explicitly Christian prayer was given at such meetings, I asked the meeting chair if I could talk to the person giving the prayer. He agreed and the Minister, who "always gives the prayer," agreed to "neutralize" the prayer, although he said—politely—that I was being discriminatory—forcing "my Prayer"—which not being Christ-based is really "Old Testament"—on those who wanted to hear a "New Testament" prayer.

PLICIT holiday or Christmas themes?³⁹ Is the scheduling of Friday night high school football fair to Jewish or Muslim players or spectators?⁴⁰

If nobody complains, nobody will even consider the issue. Our daily life is influenced by informal, non-legal controls,⁴¹ and one cannot rely on government or legal protections against these subjective, community-sanctioned bans.⁴² This is especially true for someone who belongs to a minority. That individual must be more assertive in his or her behavior to force the majority to consider other alternatives that could protect his or her freedom of conscience.

II. ASSERTIVENESS AND FREEDOM OF CONSCIENCE

It may sound trite, but sometimes clichés exist for a reason. Freedom is simply too valuable to be left to politicians or even the courts. It is sometimes essential for an individual or a group of individuals to use non-legal (not illegal) means to protect their or others' rights. This is not always successful, but the effort can lead to a better understanding of what is at risk and also to an occasional victory.

A. *Promoting Inter-Religious "Understanding"*

As noted earlier,⁴³ liberty or freedom of conscience is intended to protect people from being forced to violate their core beliefs. My core beliefs and my definition of protection of conscience focus on a strict separation of the secular from the sectarian and on the protection of minority perspectives.

This is very concrete and personal. I am a member of a religious minority—and a very small minority. I am Jewish. I believe in a Supreme Deity but not in the divinity of "God's son" nor in the special claim of interpretation of God's word by an 11th Century Middle Eastern⁴⁴ or 19th Century American "prophet."⁴⁵

39. Cf. STEPHEN M. FELDMAN, PLEASE DON'T WISH ME A MERRY CHRISTMAS 285 (1997) (displays at public zoo).

40. Cf. DERSHOWITZ, *supra* note 19, at 328 (discussing the scheduling of events on Jewish holidays).

41. See *id.* at 324 (describing acceptance of these informal rules as acceptance of "second-class" status).

42. See, e.g., discussion *infra* text accompanying notes 47–48.

43. See discussion *supra* text accompanying notes 11–15.

44. See generally KAREN ARMSTRONG, ISLAM: A SHORT HISTORY (2000).

45. See generally RICHARD L. BUSHMAN, JOSEPH SMITH AND THE BEGINNINGS OF MORMONISM (1984).

Over a number of years, I have fought on behalf of my core beliefs, not just in the public or governmental sector, but also in the private and personal realm. As a result, I am sometimes called "overly aggressive," "pushy," or "too ethnic." I should "learn my place" and "not make waves."⁴⁶ This is hard for me to do, as I live in a society that sometimes tells me that my "conscientiously held" beliefs are not merely different, but wrong. A few illustrations might suffice.

A political leader⁴⁷ spoke at the University of Tulsa College of Law and said that we must always remember that this is "a Christian nation." I could not let this pass. It would indicate acceptance of his premise. So I confronted him on this. He was, in response, polite and respectful but said "we would have to agree to disagree." Jews and others were "welcome guests" with all the rights and privileges granted to the minority, but they must remember their place.⁴⁸

At a recent meeting of an interfaith organization, the speakers spoke of "tolerance." An audience member asked whether tolerance meant mere acknowledgement or real acceptance. The speaker, a minister from a dominant mainline denomination, said that his faith could never accept any creed that did not assume the divinity of Jesus Christ. All he could promise was that he and his congregants would not interfere in our practices if we did not try to impose our practices on them. He would, however, by persuasion and at every opportunity try to convince "heathens" (his word), that they should seek the "true path" (also his words). By forcing the speaker to address the difference between "tolerance" and "acceptance," the questioner was able to let the audience see the real work that still had to be done on religious "understanding."

That not so subtle difference was highlighted by a later incident. A local fire station put a crucifix on the roof for the Christmas holidays. A number of non-Christians and an even larger number of Christians objected. Symbols in the firefighters' rooms were, of course, okay, but

46. In Yiddish, there is a phrase—"Shanda for the Goyim." It can be loosely translated that one who is Jewish should not do or say anything that might give a non-Jew an excuse to criticize not just that person but all Jews. Filling out the Jewish "stereotype" of talking back, assertiveness, or nerve or "chutzpah" is often cited as a classic example of improper behavior that is a "shanda."

47. This individual is still a major political leader. At one point, I tried to convince others to join me in confirming this conversation. They wouldn't. For this and other obvious reasons, I am reluctant to mention his name or provide other information that might lead to an identification of the individual.

48. In CHUTZPAH, *supra* note 19, at 322-23, Professor Dershowitz quotes a letter sent by Justice O'Connor in which she indicates that there are holdings by the Supreme Court that this is a "Christian Nation" and says that this letter was used by others to support resolutions that would declare the United States to be "a Christian Nation . . . based on the absolute laws of the Bible." Justice O'Connor later apologized for her comment.

having the public fire station become a religious symbol was not. Every time a non-Christian drove down that thoroughfare and saw that cross, it was a slap in the face. It made non-Christians feel like second-class citizens. Some Christian leaders opposed the cross placement, as well, as they felt it was sacrilegious to put this symbol on a governmental edifice. They recognized that this may be a "close question" on the legal issue of separation of church and state. Whatever the law, it was inappropriate.

The firefighters said that for thirty-six-hour periods, the station was their home, and they wanted a Christian symbol on their home. The mayor was lobbied heavily by the predominantly liberal interfaith organizations and did eventually order the removal of the cross.⁴⁹ The minister who had called non-Christians "heathens" contacted some community leaders to complain. He was joined by the aforementioned political leader. This is just what they had been talking about. We were "imposing our values" on the Christian majority who were firefighters in that station. That is not what is meant by tolerance. They rejected the concept of minority religious rights—public place or private place, constitutionalism or no constitutionalism.

Another incident involved a prominent regional convenience store chain. The convenience store hires assistant managers who must agree to work at the worst hours to "earn their spurs." One recent applicant was a religiously observant Jew. He indicated that he could work any weekend, but not from sundown on Friday to sundown on Saturday. He offered to work on Sundays, or from midnight to eight o'clock, or any other shift. His offer was rejected and he was not hired. The young man came to the Community Relations Committee, which I chaired, and asked the Committee to assemble some local leaders to talk to the head of the company, who had a reputation for progressive positions. I did. When we discussed the problem with the company's president, he indicated that this was a "neutral policy" and not discriminatory.

The local leaders and the president of the company tentatively agreed that the company may not have a legal duty to accommodate the prospective employee's religious needs. The follow-up question and answer were very revealing. Suppose someone would not work on Sunday, would you make him or her do that? Well no, he replied, that is the "Sabbath." In fact, he said, that had happened before. The community leaders just looked at him and did not say anything. The "moment of si-

49. See Sean Beckett, *Mayor Can't Bear Firefighters' "Cross,"* TULSA WORLD, Dec. 11, 1997, at A1; Dale J. Briggs, Editorial, *Doing the Right Thing,* TULSA WORLD, Dec. 19, 1997, at A34; P.J. Lassek, *Star Bright,* TULSA WORLD, Dec. 18, 1997, at A1.

lence" seemed to last forever. He eventually smiled, said he saw our point, and did change the company's policy.⁵⁰

In my first year as Dean at Tulsa, I invited a new graduate who was a minister to give the opening and closing prayer at our "Hooding" or commencement program. I said that even though the University of Tulsa was a Presbyterian school, I would appreciate a "non-denominational" prayer. I called on him for the recital. He spoke quite movingly about the "end of a testing of our minds and hearts" and then said, "and we now ask your blessing in the name of our Lord Jesus Christ." I took a few seconds to walk him back to his seat and then, again, asked him to give a closing benediction that was not based on one particular religious creed. He nodded acceptance. You know what is coming. He gave the benediction and ended it again with the same specific blessing.

After the program, I thanked him but told him I was surprised that he felt it necessary to end his prayers as he did, despite my specific request. He replied, quite straightforwardly, that it was a non-denominational prayer. It was not Catholic, Lutheran, Presbyterian, or Methodist. When I noted that it was still Christian, he replied, "of course." When I pointed out to him that I was Jewish and that we had some Jewish and Muslim students who did not accept Jesus as the "Christ" or Messiah, he just looked at me and said nothing.

I recently saw this minister-lawyer and we laughed over the incident. He indicated that he is now more sensitive to possible beliefs of others, probably because he has met people of different backgrounds in his practice. I would like to believe this new sensitivity started with our discussion after the Hooding. A new balance had to be set—not by law, but by practical experience.

In the mid-1990s, a new University president announced the scheduling of the homecoming day. It was Yom Kippur. Some members of the faculty and of the student body contacted him. He indicated that he had to pick a team that they could beat and the only date available was that particular day. Moreover, less than 1% of the students and faculty (and fans) would have any problems with that date. It took several calls from trustees, alums, and donors to have the date changed. By the way, the school lost both the game scheduled for Yom Kippur and the rescheduled homecoming game. This does confirm my belief that God works in mysterious ways.

50. See generally *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987) (holding that an employee baptized into Adventist Church who notified employer that her religion did not allow her to work on Saturday must be paid unemployment compensation and denial of compensation would be a violation of Free Exercise Clause).

Recently, the Tulsa School Board proposed a rule limiting absences, excused or unexcused, to five a semester. After that, it was in the Superintendent's discretion to warn, suspend, or dismiss a student. A number of Jewish and Muslim parents complained that this seemingly neutral policy discriminated against their children, who in particular semesters may need to observe as many as six or seven religious days.

The School Board, at first, rejected the argument. The loss of that many days could indicate the student did not grasp the assigned work and would be unable to accomplish the established educational goals. The parents used legal language like "reasonable accommodation."⁵¹ How about taping of classes at their expense or allowing designated note takers? The School Board would not move. The parents and faith-based and interfaith organizations, at the parents' request, came to board meeting after board meeting and demanded the right to talk. Finally, the School Board decided to have two categories: excused and unexcused absences. For excused absences, like medical appointments and religious observances, there was no set limit so long as the parents or guardians certified that the work would be covered by alternative means.⁵²

Two more personal anecdotes highlight the difficulty of assertiveness and its impact on preserving your own freedom of conscience. When I was in a public high school in the late 1950s, my history teacher had a New Testament stanza on the board every morning. I did not recite it when others did, but did stand up. (There are limits to how independent a fifteen-year-old is willing to be.)

More recently, my daughter was in a choir at her public school and they were preparing for the holiday show. The choirmaster insisted that to be in the choir, everyone had to sing all the songs. Several of the songs were explicitly religious. My daughter stood but refused to sing (like father, like daughter). The choirmaster took her to see the principal and summoned me to the principal's office so he could describe her obstreperous behavior.

51. See Civil Rights Act of 1964 § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (2000) (establishing the "reasonable accommodation" standard to determine if actions violate religious and other rights of complainants). See also *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986); *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977) (applying the "reasonable accommodation" standard).

52. See Andrea Eger, *Attendance Policy Challenged: A New TPS Rule that Could Jeopardize Students Who Miss School for Religious Reasons is Criticized*, TULSA WORLD, Dec. 17, 2003, at A15; Andrea Eger, *School Board Puts off Decision on Restrictive Attendance Policy*, TULSA WORLD, Aug. 20, 2002, at A1; Andrea Eger, *Sawyer Proposes Aims at Student Attendance*, TULSA WORLD, Aug. 16, 2002, at A1.

I listened and then asked just what she did wrong. The choirmaster was dumbfounded. I continued by telling the choirmaster that because my daughter agreed to stand but not sing, it seemed as if she went more than halfway. The choirmaster lost it. Who was I to tell him how to run his choir? I said I was not running his choir, only indicating that absolute rules are not always appropriate when you are dealing with matters of conscience. My daughter was not suspended, but neither did she participate in choir again.

I enjoy the music and rituals of other faiths. I invite carolers to come to my house to sing, and when I lived in Philadelphia, I went to Christmas Eve midnight mass. I buy Christmas CD's and enjoy going to the homes of friends who celebrate Christmas. These are my choices. I am not being directly or indirectly coerced to accept anybody else's beliefs. I am not imposing my belief system on anybody else, either.

I believe, however, that at an interfaith program, a neutral prayer is more appropriate. Such a prayer allows those present to feel included in a common set of attitudes. It does not make me or anyone else feel uncomfortable. It lowers the level of contention by avoiding conflict, indicates sensitivity, and maybe even eliminates the need for an assertive response. "Interfaith" means just that: *involvement* of those of different faiths.⁵³ It does not mean passive acceptance of someone's particular faith.

These anecdotes can be matched by more well-known cases where assertiveness and political will were necessary. For example, after the Supreme Court indicated that a rabbi who was a military officer could be dishonorably discharged for wearing a yamulka,⁵⁴ a "non-legal" political re-balancing occurred when Congress changed the rule.⁵⁵ As another example, after the Supreme Court upheld an anti-peyote law against a free exercise of religion challenge,⁵⁶ political lobbying led to a change in Oregon state law to allow the practice.⁵⁷ Not all such attempts at extra-constitutional change work, of course. *City of Boerne v. Flores* demonstrates that.⁵⁸

53. See MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 652 (11th ed. 2003) (defining "interfaith" as "involving persons of different religious faiths").

54. *Goldman v. Weinberger*, 475 U.S. 503 (1986).

55. Act of December 4, 1987, Pub. L. No. 100-180, 101 Stat. 1086 (codified as amended at 10 U.S.C. § 774 (2000)).

56. *Employment Div. v. Smith*, 494 U.S. 872 (1990).

57. OR. REV. STAT. § 475.992(5) (2003).

58. *City of Boerne v. Flores*, 521 U.S. 507 (1997). In *City of Boerne*, the Supreme Court declared the Religious Freedom Restoration Act of 1993, which attempted to "overrule" *Smith*, was not a "proper exercise of Congress' remedial or preventive power." *Id.* See also Belsky, *supra* note 16, at 98-100.

B. Responding to Intra-Religious Conflict

Even within faith groups restrictions are sometimes put on one's freedom of conscience. Acceptance of differences and demanding one's right to be different cannot be limited to just "outsiders."

Assertiveness is especially difficult in these "informal" settings. A few examples will show how this difficulty has often led to inaction. At the extreme, not following the rules of your group can lead to exclusion. In some Native American cultures, failure to follow the majority has led to banishment. Having independent thoughts was and is inconsistent with the "community standards."⁵⁹ And this shunning applies today to major religions.⁶⁰

In the 1970s, the conflict between the Protestants and the Catholics in Northern Ireland led to the "taking of sides." If you did not accept the need for victory and instead talked of peace, you were an outsider.⁶¹ This applied not only to those who lived in Ireland, but to Americans of Irish descent in the United States. A group of Irish-Americans was imprisoned after refusing to testify before a federal grand jury about the activities of the IRA.⁶² At a congressional hearing on the imprisonment of the "Fort Worth Five" in the 1970s, the discussion seemed to focus on grand jury abuse, but in fact it was an example of conflict of ideology.⁶³ State Department representatives argued that the activities of terrorists in Northern Ireland meant that "extraordinary means" were allowable. Catholic religious and lay leaders urged that this was a matter of freedom of conscience; all that was being punished was vocal and explicit financial support for "freedom fighters."

59. See RENNARD STRICKLAND, *FIRE AND THE SPIRIT* 24, 170-71 (1975).

60. See Laurie Goodstein, *Methodists Put Pastor on Trial for Declaring Herself a Lesbian*, N.Y. TIMES, Mar. 18, 2004, at A1; Gina Kolata, *Under Pressures and Stigma, More Doctors Shun Abortion*, N.Y. TIMES, Jan. 8, 1990, at A1. In recent years, the threat of excommunication has been used in some cases against those who disagree with some established church policy. See Pam Belluck, *Letter Supports Anti-Kerry Bid Over Abortion*, N.Y. TIMES, Oct. 19, 2004, at A18.

61. See JOSEPH RUANE & JENNIFER TODD, *THE DYNAMICS OF CONFLICT IN NORTHERN IRELAND* 2 (1996).

62. See *Federal Grand Jury: Hearings on H.R.J. Res. 46, H.R. 1277 and Related Bills Before the Subcomm. on Immigration, Citizenship, and Int'l Law of the House Comm. on the Judiciary*, 94th Cong. (1976) (statement of Hon. Edward M. Kennedy on the Fort Worth Five and Grand Jury Abuse, Mar. 13, 1973).

63. See *Grand Jury Venue—Northern District of Texas: Hearings on H.R. Res. 220, H.R. Res. 281, and Similar Resolutions of Inquiry Before the Subcomm. No. 1 of the House Comm. on the Judiciary*, 93rd Cong. (1973) [hereinafter *Fort Worth Five Hearings*]. These and other hearings were used by members of Congress to support the idea of Grand Jury Reform. See Joshua Eilberg, *A Proposal for Grand Jury Reform*, 60 JUDICATURE 390, 392 n.4 (1977).

Conscience was raised and challenged on both sides of the issue. A Catholic who took the State Department line was castigated by a number of senators as to where her "loyalty" lay.⁶⁴ The right to exercise her own conscience was unacceptable. An American Protestant leader who took the "free speech" line was praised by the same senators, but then attacked by Northern Irish Protestant ministers as "traitorous."⁶⁵ Yet, it is clear that the present peace process in Northern Ireland is a direct function of courageous people on both sides willing to stand up to the pressure to conform and seek compromises.⁶⁶ Sometimes being moderate is being assertive.

In recent years, a similar series of conflicts has occurred with the Jewish and Muslim faith. I am a "dove" and believe the long-term interest of Israel, the United States, and the world is for a peaceful solution to the now fifty-seven year conflict. Israel is not always right, and I reserve the right to criticize Israeli policies. I have been told repeatedly this is "giving comfort to the enemy," and that I must keep my mouth shut. The Jewish community demands my silence and the suppression of my conscientiously held beliefs.⁶⁷ Similarly, I have some Muslim friends who are naturally appalled by the terrorist activities of some of their fellow Muslims. Yet my friends are unwilling to publicly criticize their fellow Muslims, and when they do, they talk about the "circle of violence" and equate 9/11 with Israeli incursions. When confronted privately, my friends say they have to work within the system.⁶⁸

The confusion of support and identity works both ways. During the energy crises of the 1970s, American Jews were "blamed" for the situation because of their support of the State of Israel.⁶⁹ In the 1980s, this challenge to split loyalties was heightened by the "Jonathan Pollard affair."⁷⁰

64. See also *Grand Jury Reform: Hearings Before the Subcomm. on Immigration, Citizenship, and Int'l Law of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. (1977); *Federal Grand Jury: Hearings on H.R.J. Res. 46, H.R. 1277 and Related Bills Before the Subcomm. on Immigration, Citizenship, and Int'l Law of the House Comm. on the Judiciary*, 94th Cong. (1976); *Reform of the Grand Jury System: Hearings on S. 3274, H.R. 1277, H.R. 6006, H.R. 6207, H.R. 10947, H.R. 11660, H.R. 11870, H.R. 14146, and H.R.J. 46 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 94th Cong. (1976). See generally *Forth Worth Five Hearings*, *supra* note 63.

65. *Id.*

66. See RUANE & TODD, *supra* note 61, at 274-79.

67. See generally Alan Cooperman & David Makovsky, *America's Jews and Israel's Leaders*, U.S. NEWS & WORLD REP., Nov. 17, 1997, at 52 (discussing pressure on Jewish leaders to back Israeli government policy publicly and privately).

68. See Jacob Howland, Letter to the Editor, WALL ST. J., Nov. 6, 2001, at A27.

69. See Linda Charlton, *Jews List Causes of Energy Crisis*, N.Y. TIMES, Feb. 18, 1974, at 14.

70. Jonathan Pollard was a United States Navy intelligence officer. In 1985, he was ar-

American Muslims now face the same challenges. Many Muslims are having a hard time defending their religious beliefs and even explaining what those beliefs really are. For example, many Americans still believe that the Islamic concept of "jihad" means a "holy war" that justifies terrorist acts by Muslims against any person, group (including ethnic group), or government, that acts in opposition to Islamic concepts.⁷¹ This belief exists despite attempts by moderate Muslims and others to explain that "jihad" means "struggle" against injustice, false teachings, and improper behavior and that the struggle ordinarily does not involve violence.⁷² Some statements in the popular and mainstream press seem to justify targeting, detaining, and shadowing Muslims, particularly Arab Muslims, and even restricting their employment and travel.⁷³ The argument is that, wittingly or not, we are dealing with a monolithic enemy, and because of their absolute belief systems, the entire group must be dealt with as a unit.⁷⁴ This has, of course, happened before.⁷⁵

There are numerous other examples of intra-religious conflicts where punishment is meted out for doing the "wrong" or non-majoritarian thing.⁷⁶ These include ordination of gay ministers,⁷⁷ ap-

rested, tried and convicted of charges of selling classified material to Israel. He was sentenced to life imprisonment and his wife was sentenced to five years in jail for assisting her husband. Pollard claimed and still claims that he was only providing information that he felt was vital to Israeli security and was improperly being withheld from Israel. His life sentence was the most severe prison term ever given for spying for an ally and is also greater than the average term imposed for spying for the Soviet Union and other enemies of the United States.

Israel has now admitted that Pollard had worked for Israeli intelligence, has granted him citizenship, and has been lobbying for his release with both President Clinton and President George W. Bush. In addition, a large number of individuals have formed a lobbying group requesting a pardon and filing law suits challenging his sentence and the withholding of information about his trial and imprisonment. See Brian Duffy, David Makovsky & Warren P. Strobel, *The Spy Who is Still Stuck in the Cold*, U.S. NEWS & WORLD REP., Jan. 18, 1999, at 22. See also DERSHOWITZ, *supra* note 19, at 284-312.

71. See Daniel Pipes, *What is Jihad?*, N.Y. POST, Dec. 31, 2002, at 21. The conflict of interpretations between "holy war" and "struggle" is long standing. See KAREN ARMSTRONG, *ISLAM: A SHORT HISTORY* 36 (2000).

72. See Asma Mobin-Uddin, *'Jihad' Really Means to Strive for the Sake of God*, COLUMBUS DISPATCH, July 12, 2002, at 1D; All Things Considered: *Replacing the Misused Word "Jihad" with "Hiraba"*, (National Public Radio broadcast, Jan. 7, 2005). This is even true at places like Harvard. See Nader R. Hasan, *Jihad and Veritas*, N.Y. TIMES, June 5, 2002, at A27.

73. See Sarwat Husain, *Law and Media See Muslims as Criminals: Fuel More Hate*, SAN ANTONIO EXPRESS-NEWS, Sept. 19, 2003, at 7B.

74. See, e.g., Yossi Klein Halevi, *Islam's Outdated Domination Theology*, L.A. TIMES, Dec. 4, 2002, Metro, Part 2, at 13.

75. *Korematsu v. United States*, 323 U.S. 214 (1944).

76. Watch some of the televangelists. There is no right to a choice based on conscience. There is absolute right and wrong. The only freedom of conscience is to accept the leader's word as to what is mandated by the Bible or other texts.

This absolutism, of course, is not limited to any one faith group. I asked a Hasidic

proval of gay marriages,⁷⁸ even acceptance of interfaith marriage,⁷⁹ and most recently in my hometown of Tulsa, evolution versus "scientific creationism."⁸⁰

Dealing within one's own group and forcing one's religious or cultural peers to at least think about, if not address, different perspectives, is seldom rewarded directly. "Reform" must first be accepted as non-heresy. Activists must view this as a long-term process of change and victories defined as having others at least listen, if not respond, and then building on this conversation for the future.

Acknowledgment of differences, and then possible acceptance, can be illustrated by how our society deals with certain overt actions or "rituals" that focus on the conflict between majority and minority values. Again, making the conflict visible and then balancing the interests is essential to the protection of freedom of conscience.

In the last two sections, I have shown that it is important to make a majority versus minority conflict of values visible in order to allow the balancing of interests and a fair determination of the limits of freedom of conscience. The next section indicates how important it is to apply this assertiveness principle to rituals or actions based on core beliefs.

C. Rituals, Behavior, and the Limits of Freedom of Conscience

Certain beliefs, whether faith-based or not, are connected to rituals. I follow certain rituals with which, either because of my upbringing or my choices, I am comfortable. My society has told me, however, that in certain circumstances, some of my rituals are unacceptable to its polity. For example, in certain places and at certain times, if I observe a Satur-

rabbi to participate in an interfaith discussion. He refused. We must take a hard line, he urged. There is only one path and by participating with other religious groups, we are implying that Jesus may have been the Messiah. He went further and explained to me why the Chabad support Christmas displays in public places. This would make Jews less comfortable in the broader society and more likely to come back to their true core beliefs (as he and his comrades define it, of course).

77. *A Gay Bishop for Episcopalians*, N.Y. TIMES, Nov. 5, 2003, at A24; Laurie Goodstein, *Conservative Methodists Propose Schism Over Gay Rights*, N.Y. TIMES, May 7, 2004, at A20.

78. See Nicholas D. Kristof, *God and Sex*, N.Y. TIMES, Oct. 23, 2004, at A17.

79. See Kenneth Guentert, *Intermarriage: The Problem*, SCHUELLER HOUSE, at www.schuellerhouse.com/goywed1.htm (last visited Apr. 8, 2005).

80. See Editorial, *Creationism Redux*, TULSA WORLD, Feb. 27, 2004, at A20; Dobie Lagenkamp, *The Evolution Wars*, TULSA WORLD, Apr. 16, 2000, at C4; Marie Price, *House Roundup*, TULSA WORLD, Apr. 29, 2004, at A10.

day Sabbath, I cannot open my store on the "secular" Sunday Sabbath⁸¹ (although, of course, I can sell items at a baseball or football game).

Some states have considered bans on certain religious acts, like circumcision or kosher slaughtering.⁸² The Supreme Court has said that as long as there is a neutral, non-religious basis for the rule, there is no need to provide any special justifications for the restrictions.⁸³ Concerns that this "neutrality" concept may result in the banning of some core rituals of faith have forced some citizens to make highly visible objections. This assertiveness, in turn, has led to attempts by Congress to overturn the Supreme Court's decision, even though it has so far been unsuccessful.⁸⁴

And, of course, out of the context of legal doctrine, stores, athletic facilities, and broad-based community organizations set their own limits on rituals or even behavior. The Boy Scouts of America may bar gays from being scouts or scoutmasters on a faith-based premise.⁸⁵ Yet, again, this restriction has been exposed by courageous challengers and, at least, in some localities, the restriction has led to decreased funding for Scout activities.⁸⁶

Making issues visible allows us to determine boundaries and does not require acceptance of every ritual, religious tenet, or activity. Ritual murder is a good historical example. Very few would accept that it is ever appropriate to kill another person as part of a religious ceremony, even if such killing is based on the most fundamental religious belief. Publicizing such acts, and society's condemnation of them, reaffirms our commitment to the limits of accepted behavior.⁸⁷ Slavery and discrimination based on the biblical story of Ham are modern examples. It is important for religious leaders to periodically note the myth of a God-based racial or religious inferiority, which is still being stealthily transmitted, and to challenge the myth's theoretical underpinnings and thus help has-

81. These Sunday "Blue Laws" have been upheld as constitutional. See *McGowan v. Maryland*, 366 U.S. 420 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Gallagher v. Crown Kasher Super Market*, 366 U.S. 617 (1961).

82. See Celia W. Dugger, *New Law Bans Genital Cutting in United States*, N.Y. TIMES, Oct. 12, 1996, at A1; Linda Greenhouse, *The Supreme Court: Animal Sacrifice*, N.Y. TIMES, June 11, 1993, at A1.

83. *Employment Div. v. Smith*, 494 U.S. 872 (1990).

84. See *supra* note 58.

85. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

86. See Heather MacDonald, *Boy Scout Battle Pits Gay Activists vs. Minority Kids*, WALL ST. J., July 6, 2000, at A26.

87. Kate Connolly, *German Satanist Couple Held After Ritual Murder*, THE GUARDIAN, July 13, 2001, at 15. Of course, the myth of Jewish ritual murder has been a core argument of anti-Semites. See generally JONATHAN FRANKEL, *THE DAMASCUS AFFAIR: "RITUAL MURDER," POLITICS, AND THE JEWS IN 1840* (1997).

ten its demise.⁸⁸ But what about polygamy⁸⁹ or a religiously-based "strict application of corporal punishment" to children and to wives?⁹⁰ Do we want to accept a religiously-based premise that women must be subservient and not allowed to own property, work outside the home, or vote?⁹¹ Or to be more technical, what about saying that a woman cannot drive a bus with passengers who are male students?⁹² All of these concepts are premised on someone's definition of freedom of conscience.

Now to some specific examples again. A student in a constitutional law class refused to participate in a discussion on abortion. He felt that the law was just wrong. He later asked his professor if he would ever have to defend the "Roe decision" in an exam. He just would not—could not—do it. He rejected the concept of lawyer as "hired gun."⁹³ With the student's permission, the professor then used the student's position as a basis for a class discussion of the role of a lawyer and public versus private values. The student's assertiveness about what limits can or should be set on his behavior in the classroom forced both teacher and students to address their biases, how lawyers should be trained, and just how far a professor, law partner, or judge can or should go in dealing with subordinates.

An animal rights group, as a matter of conscience, blocked entry to fast food hamburger restaurants. One potential patron was injured trying to get through the line. The animal rights protestors felt that it was better for one human to be injured than to have thousands of cows slaughtered.⁹⁴ The activists here, like the demonstrators in my opening anecdote, would not accept a limit on their behavior. What is the proper bal-

88. See KATIE CANNON, *SLAVE IDEOLOGY AND BIBLICAL INTERPRETATION*, 47 *SEMEIA* 9 TO 23 (1989); THOMAS BUFORD MASTON, *SEGREGATION AND DESEGREGATION: A CHRISTIAN APPROACH* (1959).

89. See generally *Reynolds v. United States*, 98 U.S. 145 (1878).

90. See, e.g., Azell Murphy Cavaan, *Minister Fights for Right to Spank Son*, *BOSTON HERALD*, Sept. 12, 1999, at 9; Mineke Schipper, *A Thousand Proverbs Later, It's Still a Brutality*, *L.A. TIMES*, Apr. 20, 2004, at B15.

91. See generally Kit R. Roone & Ilana Ozernoy, *Afghan Women Find New Hope*, *U.S. NEWS & WORLD REP.*, Dec. 3, 2001, at 22.

92. See *Bollenbach v. Bd. of Ed.*, 659 F. Supp. 1450 (S.D.N.Y. 1987).

93. The concept of "lawyer as hired gun" is premised on the total advocacy theory, which states that a lawyer is to forcefully represent his or her client and defend that client's actions despite that lawyer's own moral or ideological beliefs. Compare MONROE FREEDMAN, *LAWYER'S ETHICS IN AN ADVERSARY SYSTEM* (1975) (defending the total advocacy model), with MARVIN FRANKEL, *PARTISAN JUSTICE* (1980) (criticizing the theory). See also Martin H. Belsky, *The Retaliation Doctrine: Promoting Forensic Misconduct*, 50 *ALB. L. REV.* 763, 767-773 (1986) (analyzing and applying the conflicting theories to trial behavior).

94. See Marcia Yablon, *Happy Hen, Happy Meal: McDonald's Chicks Fix*, *U.S. NEWS & WORLD REP.*, Sept. 4, 2000, at 46.

ance here? Should this assertiveness be rewarded or should it be handled as a true act of civil disobedience and punished appropriately?⁹⁵

And what about Dr. Jack Kervorkian? The Michigan state attorney indicated that assisted suicide is a crime, and the Supreme Court has said it does not violate the right to privacy for a state to so declare.⁹⁶ Kervorkian, whatever you think of him as a publicity-hungry demagogue, does rest his argument on conscience. His behavior, he urges, is based on his duty to help those who want to end their lives on their own terms.⁹⁷

All of these examples of actions, behavior, or rituals supposedly express matters of core beliefs. Yet, not all of them are acceptable or should be. Society has to make choices as to the appropriate balance between rules for the common good and an individual's right to act based on his or her own concept of conscience. The next section discusses a process by which we can do this.

III. STRIKING THE BALANCE AND THE "MARKETPLACE OF IDEAS"

An old adage states: "Where you stand depends on where you sit."⁹⁸ By definition, society should and can set limits on an individual's behavior. Rights may be assumed, but sometimes they conflict. And even when they do not conflict, they can be limited by other rules established for the common good and to protect community standards. For example, one has a right to own property.⁹⁹ Others may have a claim to perform certain actions on that property,¹⁰⁰ and neither can use it to unduly harm others.¹⁰¹ What is considered harmful is both subjective and objective. In American jurisprudence, restrictions can include written guidelines such as zoning¹⁰² or case-by-case determinations of nuisance.¹⁰³

95. See text, *supra* note 4.

96. *Washington v. Glucksberg*, 521 U.S. 702 (1997).

97. Joseph P. Shapiro & David Bowermaster, *Deaths on Trial*, U.S. NEWS & WORLD REP., Apr. 25, 1994, at 31-39; John Leo, *Dancing with Dr. Death*, U.S. NEWS & WORLD REP., Mar. 22, 1999, at 16.

98. See, e.g., John Engler, *Judicial Selection: A View from the Governor's Perspective*, 75 MICH. BAR J. 910 (1996). See also Peter M. Jarvis, *Where You Stand Depends on Where you Sit: One Litigator's View of Multijurisdictional Practice Issues and Related Policy Issues*, at <http://www.abanet.org/cpr/mjp-pjarvis.html> (last visited Aug. 23, 2005).

99. U.S. CONST. amend. V ("takings" clause).

100. *Archer v. Greenville Sand & Gravel Co.*, 233 U.S. 60 (1914) (easement). See Martin H. Belsky, *The Public Trust Doctrine and Takings: A Post-Lucas View*, 3 ALB. L.J. SCI. & TECH. 17 (1994) (describing use of the "public trust doctrine" to enforce community norms as against individual's desire to use his or her own property).

101. See RESTATEMENT (SECOND) OF TORTS § 519 (1995) (provision regarding ultrahazardous activity).

102. See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

One also has a right to marry and to establish a family unit.¹⁰⁴ Laws, however, can limit whom a person can marry¹⁰⁵ and what is allowable behavior in the family unit.¹⁰⁶ And again, these laws can change.¹⁰⁷ Right now, you can only be married to one spouse at a time¹⁰⁸ and in most places, only to one of a different gender.¹⁰⁹ Intra-family violence, once ignored, is now criminal.¹¹⁰

In our democracy, one has a right to speak out on public issues,¹¹¹ to run for office,¹¹² and to vote for candidates.¹¹³ But you may be limited by how much money you can spend on the political process,¹¹⁴ be forced to give up your job to run for office,¹¹⁵ and be barred from voting because of age,¹¹⁶ status,¹¹⁷ and geography.¹¹⁸

In each of these situations, a limitation was set through assertiveness and a clash of principles. This is the classic concept of a "marketplace of ideas:"¹¹⁹ let there be open competition between ideas so that

103. *Boomer v. Atl. Cement Co.*, 26 N.Y.2d 219 (N.Y. 1970). See generally Belsky, *supra* note 23, at 5-9.

104. See *Zablocki v. Redhail*, 434 U.S. 374 (1977).

105. See, e.g., N.Y. PENAL LAW § 255.15 (McKinney 2000) (bigamy); N.Y. PENAL LAW § 255.25 (McKinney 2000) (marriage to close relative).

106. See Kathleen Waits, *Battered Women and Their Children: Lessons From One Woman's Story*, 35 HOUS. L. REV. 29 (1998).

107. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (laws that bar inter-racial marriage are unconstitutional).

108. See *Reynolds v. United States*, 98 U.S. 145 (1878) (upholding ban on polygamous marriage).

109. Compare *In re Opinion of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004) (state laws that bar same-sex marriage in violation of state Constitution), with Alaska Const. art. 1, § 25 (amended 2000) (constitutional Amendment precluding same-sex marriages, passed after State Supreme Court found that ban of same sex marriage was invalid under old Constitution). See Defense of Marriage Act, Pub. L. No. 104-199, § 2(a), 110 Stat. 2419 (1996); 1 U.S.C. § 7 (2000); 28 U.S.C. § 1738C (2000).

110. See generally Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267 (1985); Note, *When is Parental Discipline Child Abuse? The Vagueness of Child Abuse Laws*, 34 U. LOUISVILLE J. FAM. L. 403 (1995).

111. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (discussing the "marketplace of ideas").

112. See *Williams v. Rhodes*, 393 U.S. 23 (1968).

113. See *Katzenbach v. Morgan*, 384 U.S. 641 (1966). This right to vote must be somewhat equal to every other person's right. See *Reynolds v. Sims*, 377 U.S. 533 (1964). See also Martin H. Belsky, *Reapportionment in the 1970's: A Pennsylvania Illustration*, 47 TEMP. L.Q. 3 (1973).

114. See, e.g., *McConnell v. FEC*, 540 U.S. 93 (2003).

115. *Clements v. Fashing*, 457 U.S. 957 (1982). See also *Commonwealth ex rel. Specter v. Moak*, 307 A.2d 884 (Pa. 1973).

116. U.S. CONST. amend. XXVI, § 1.

117. See, e.g., *Emery v. State*, 580 P.2d 445 (Mont. 1978) (prisoner).

118. *Dunn v. Blumstein*, 405 U.S. 330 (1992).

119. See *Am. Booksellers v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *summarily aff'd* 475

the community can accept or reject particular applications of a tenet.¹²⁰ These applications must be subject to future questioning and then change to reflect a new balance between conflicting positions.

The debate over campaign financing is a good illustration of this process. Reformers were concerned about the impact of money on political campaigns. They wrote articles, gave speeches, lobbied state and federal legislators, and promoted revelations of the impact of contributions on political decisions. Money, they urged, interfered with the expression of ideas or conscience by individual voters. This assertiveness focused the public's attention on the issue and led to calls for campaign financing laws. Opponents argued that any limitations by the government on political expression, whether by words or money, violated the First Amendment. Allowing the government to set limits or to fund candidates might bar independent voices from entering the political process.¹²¹

Under the old balance before 1971, there were no limits on campaign financing. Statutes were passed and challenged under the Constitution. A new balance was set. New laws were passed and new challenges made.¹²² And the process continues. But such a new synthesis can only happen if someone, or some group, is willing to challenge the status quo.¹²³ The competition must be open and fair.¹²⁴ And the law, both in itself and through implementing government entities, can and should provide the opportunity for change.

U.S. 1001 (1986) (idea is that with free competition of ideas, "truth will prevail").

120. See Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 TEX. L. REV. 1 (1990) (describing how enforcement of individual rights in certain contexts has separate and independent community value when community must overtly face the conflict).

121. See DANIEL A. FARBER, *THE FIRST AMENDMENT* 234-40 (1998).

122. See *McConnell v. FEC*, 540 U.S. 93 (2003) (upholding parts of and rejecting other parts of "Bipartisan Campaign Reform Act of 2002" also known as the McCain-Feingold law); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990) (upholding state prohibition on corporate expenditures in political campaigns); *FEC v. Nat'l Conservative PAC*, 470 U.S. 480 (1984) (invalidating limits on expenditures by political action committees); *Buckley v. Valeo*, 424 U.S. 1 (1976) (upholding some parts and rejecting other parts of the Federal Election Campaign Act of 1974).

123. See, e.g., MORRIS DEES, *A LAWYER'S JOURNEY* (2001) (describing decades of lawsuits against Klan and other hate groups); RICHARD KLUGER, *SIMPLE JUSTICE* (1975) (describing decades-long challenge to segregation resulting in *Brown v. Board of Educ.*); SARAH WEDDINGTON, *A QUESTION OF CHOICE* (1992) (describing successful challenge to anti-abortion laws).

124. See *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 709 (1992) (Kennedy, J., concurring) (must allow open "marketplace" for distribution of ideas through pamphlets).

Even if we accept the idea that government and law cannot really force anyone to believe a particular creed or idea, it does have the ability to influence society's attitudes and even change people's minds by making certain ideas and actions based on these ideas first politically incorrect, then illegal, then beyond the pale. Racial prejudice is a good example of this process.

Explicit discrimination based on race or religion has now reached the third stage. Decades of social action were followed by laws and then societal reassessment. Today, discrimination has to be more subtle.¹²⁵ But by requiring that more acceptable justifications be given for this kind of behavior, over time, core beliefs change.¹²⁶ This process applies to all freedom of conscience issues and is particularly important today. We are facing a reassessment of attitudes on "moral values."¹²⁷

Some religious and political leaders claim a modern moral degradation of our society because we have removed religion from the public square. Similarly, society—the majority society, they argue—has a right to force such thinking on the unknowing minority. As illustrated by my anecdotes about the political leader, minister, and fire station display,¹²⁸ the contention of these leaders is that the "melting pot" was never intended to allow separate lumps forever. They believe that there is such a thing as divinely stated "right and wrong," and they urge that society and government must enforce these heavenly standards.¹²⁹

Only by making the conflict of values overt can these attitudes be first exposed, questioned, and then hopefully answered. One early lesson law students learn from reading constitutional dicta¹³⁰ and law review commentary¹³¹ is the purpose of the First Amendment's free speech protection. In a true democracy, competing ideas must be given space to be tested. Freedom of conscience specifically requires such space to allow my or your perspective to be considered with respect. And this consideration cannot be limited to the governmental context.

125. "Hypocrisy is an homage that vice pays to virtue." FRANÇOIS DUC DE LA ROCHEFOUCAULD, *MAXIMS* 218 (Stuart D. Warner & Stéphane Douard trans., St. Augustine's Press 2001) (1678).

126. In International Law, there is a well-accepted practice that nation-states seek to justify their actions in terms of the principles of international law. In so doing, they integrate the rule of law, and changes in these rules, into their behavior. See generally LOUIS HENKIN, *HOW NATIONS BEHAVE* (2d ed. 1979).

127. See Mortimer B. Zuckerman, *A Closer Look at America*, U.S. NEWS & WORLD REP., Dec. 13, 2004, at 68.

128. *Supra* text preceding and following note 47.

129. See JOAN DELFATTORE, *THE FOURTH R* 299–300, 305–14 (2004).

130. See, e.g., *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969).

131. See, e.g., Note, *The Impermeable Life: Unsolicited Communications in the Marketplace of Ideas*, 118 HARV. L. REV. 1314 (2005).

CONCLUSION

I realize that it is impossible to fight these battles every day. The Bible is still read in some public schools today. Individuals are told to remove their hats when they enter a building, even if the head covering is religious in nature. Malls continue to pick and choose which entities they will allow to use their open space and what issues they will allow to be raised within their walls. Both private and public employers decide who to fire and hire based on an individual's belief systems and actions based on those beliefs. People are stopped and searched because someone believes they belong to a dangerous creed. Yet, it is important that we speak up as often as we can. Without such assertiveness—even if on an irregular basis—society cannot respond to infringements of others' freedoms, and these "slights" will become the norm.¹³² Only through a highly visible balancing process that depends upon aggressive representation of positions in both the public and private spheres will we establish what are laws and what society will accept, sometimes grudgingly, as freedom of conscience.

132. At the Conference on "Conscience and the Free Exercise of Religion" held on January 28, 2005, at the University of Colorado School of Law, several participants asked about the anecdotes I discussed and pointed out that they do not necessarily reflect freedom of conscience. In the disputes I have described in this article, proponents and opponents of various positions believed they were acting out of conscience. This is precisely my argument. Without "assertiveness," no explicit recognition of all points of view can be seen, acknowledged, and then analyzed. Not all acts taken in the name of conscience will be approved or allowed. But without making these issues visible, we will never know what the limits of individual responsibility should be and how and if these limits should be imposed.